No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

BRIEF OF APPELLEE

EMMETT C. ANGLAND
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Ford Building
Great Falls, Montana

Filed ....., 1958

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Charles N. Pray, which Opinion was entered May 26, 1956 (R. 32-37).

The Opinion entered May 26, 1956 sets forth the issues in this case as determined by the Honorable Charles N. Pray, District Judge. The issues in that Opinion together with the Findings of Fact and Conclusions of Law both provide that the evidence preponderates in favor of the plaintiff, appellee here, and against the defendant, appellant here.

The appellant's brief does not set forth a complete statement of the case and we believe that it is proper to set forth a statement of the case in this brief.

This was an action brought under the declaratory judgment Act, 28 U.S.C.A. 2201, in the nature of an action for breach of contract.

While the date that the contract of insurance was ordered is not the basis upon which this case was decided by the District Court, yet throughout appellant's brief an attempt is made to lead this Court to believe that there was an application for insurance made on September 20, 1952. The only evidence in the case is that there was a telephone call on September 20, 1952 to determine why the insurance policy had not been received and this matter was considered by the District Judge and for clarification of that question we quote from the Opinion and Decision:

> "Mrs. Lenora A. Tacke, wife of the plaintiff, Leo Tacke, testified concerning three conversations over the telephone with Mr. Kelly or representatives of his office in connection with ordering the

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The appellant issued and delivered to appellee an automobile policy of insurance under and by which policy of insurance appellant insured appellee from

12:01 A.M. on September 20, 1952 to September 20, 1953. The policy was issued through appellant's agent, Bill Kelly Realty, authorized by appellant insurance company to make a binding contract of insurance.

In the complaint it is alleged that the policy of insurance was ordered from the Bill Kelly Realty on the 17th day of September, 1952 (R. 4). There never was in fact a written application made and signed by appellee or anyone acting for him. There was evidence to the effect that Jane Halverson, employee in the office of Bill Kelly Realty, prepared a memorandum of a telephone call on September 20, 1952 (R. 167) on a form usually used for insurance applications. Throughout the brief of appellant an attempt is made to lead this Court to believe that this was an application made and signed by appellee and the only order for the insurance. Appellant's contentions in this regard just are not supported by the evidence or the findings of the Court. The wife of appellee did telephone the Bill Kelly Realty on the morning of September 20, 1952, in order to learn why the insurance policy she had ordered on September 17, 1952, three days before, had not been received (R. 115). This is specifically referred to in the opinion of Judge Pray (R. 36).

The appellee who is the named insured was involved in an accident on the morning of September 20, 1952. He was rendered unconscious in the acci-

dent and taken to a hospital. Upon leaving the hospital in company with a Highway Patrol Officer he stopped at the Bill Kelly Realty to report the accident. He therefore reported the accident shortly before noon on September 20, 1952 and before the policy of insurance referred to in this action was delivered to appellee. The policy was forwarded to appellee in an envelope which was postmarked at 5:00 P.M. September 20, 1952 (R. 79; Ex. 7, R. 199).

On September 22, 1952, appellee paid the required premium for the policy (R. 200, Ex. 8).

Appellant's insurance adjuster, W. D. Hirst, began an investigation of the case either on September 22 or 23, 1952 (R. 137-138).

At no time has the appellant notified the appellee that the policy of insurance was void and of no force and effect.

The policy of insurance provides in Paragraph 22 of Conditions that the company may cancel the policy upon ten days notice to the insured. Under date of December 10, 1952, the General Agent of the appellant company, H. S. Dotson, forwarded to the appellee a Notice of Cancellation which states on its face that "Under the terms of" the policy, cancellation of the policy would become effective as of 12:01 A.M. December 21, 1952 (R. 15). Following the cancellation there was a partial refund of the premium that had been paid. The obvious question becomes, For what period was the earned premium retained?

The answer is that by this action the appellant fixed the insured period as commencing 12:01 A.M. September 20, 1952 and terminating 12:01 December 21, 1952. The Opinion of the Court dated May 26, 1956, answered the question in the same way and notes that the appellant fixed the term of the insurance contract. (R. 32-37).

After the appellant had ratified its contract of insurance by issuance of the Notice of Cancellation, then the appellant insurance company advised the Montana Highway Patrol that the appellee was not covered by insurance at the time of the accident which occurred on September 20, 1952. The Montana Highway Patrol Supervisor, Glenn M. Schultz, issued his Order of Suspension dated April 28, 1953, (Exhibit D attached to the complaint, appellee's Exhibit 10, R. 20). An appeal was taken to the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade from the Order of Suspension. As shown on the face of the Order of Suspension the Safety Responsibility Law of the State of Montana required that the Order of Suspension be issued unless evidence was produced that (1) Leo Tacke had been released from liability, (2) been adjudicated not to be liable, (3) executed an agreement to pay for all claims, (4) or deposit a bond for the payment of claims or finally unless it was found that Leo Tacke had liability insurance "in effect at the time of the accident".

When this matter was before the Honorable J. W. Speer on the appeal from the Order of Suspension the same determinations under the Safety Responsibility Law of Montana were of necessity presented for determination by the Court. The result was that Judge Speer determined which of the above alternatives had been complied with in order to relieve Leo Tacke from the Order of Suspension issued under the Safety Responsibility Law of the State of Montana. The determination was that there was insurance in effect at the time of the accident (R. 24). The Order of Judge Speer dated the 30th day of July, 1953 (R. 24) is clear on this point. The defendant had an opportunity to be heard and again the Order of Judge Speer shows on its face that the appellant failed to appear though being a party in interest, served with process advising them that a hearing would be held on the 30th day of July, 1953 (R. 24). This refusal to appear was again a ratification of the contract of insurance issued by the defendant through its agent authorized to issue the contract of insurance.

Following that decision of Judge Speer the attorneys for the appellee wrote to the appellant, Canadian Idemnity Company under date of October 30, 1953, (Appellee's Ex. 14, R. 207). Enclosed with that letter was a copy of Judge Speer's decision and we advised the company at that time that we believed that the company had waived its right to deny the contract of insurance on that date. (R. 207, Ex. 14). The response of the appellant insurance company was in

effect a further ratification of the contract of insurance (Appellee's Ex. 15, R. 210).

No attempt was ever made to refund the earned premium until after an action had been filed against appellee arising out of the accident that had occurred on September 20, 1952 and at that time the appellant made no attempt to refund the earned premium, but its counsel by letter dated June 11, 1954, addressed to counsel for appellee, enclosed its check payable to appellee for the earned premium(Appellee's Ex. 1, R. 195-196), **more than a year and a half** after the cancellation of the insurance policy. That purported tender of the earned premium was refused by appellee by letter addressed to the attorneys for appellant (Ex. 3. R. 197).

ARGUMENT

At the outset of appellant's argument in its brief inconsistent positions are adopted. First, a case is cited to contend that the insurance policy is void and then, as a comment on that case, counsel states:

"At least, that particular risk is not covered" (Br. 12).

What then is appellant asking this Court to do? The prayer of appellant's brief asks this Court to determine that the contract of insurance was effective at some time other than the time set forth in the contract of insurance, 12:01 A.M. September 20, 1952. The appellant then is contending for one of

two wholly inconsistent theories in order to avoid its contractual liability.

The **first position** as we read appellant's brief, is that this Court should now at this late date permit the appellant to rescind its contract.

The **second position** is to the effect that appellant is contending that there was a contract of insurance in existence but that this Court should reform the contract.

To discuss these contentions we will first discuss appellant's **second position** as above set forth.

The contract which the Court has for consideration is a contract of insurance prepared by the appellant insurance company. It is and was effective at 12:01 A.M. on September 20, 1952. If this Court could change the effective hour of the policy, the Court can change the effective day of the policy or the effective month of the policy. The suggestion is that this Court re-write the contract or make it say something different than it does say.

If the appellant in this case thought it had a proper case for reformation of a contract, it had a long time and ample opportunity to bring such an action. No such action was ever instituted by the appellant and no such action is now before this Court for consideration. No such action was suggested when the matter was presented for consideration by the Honorable J. W. Speer, Judge of the State District Court, in the case entitled, Leo Tacke, appellant, vs. Glenn M.

Schultz, Supervisor of Montana Highway Patrol, respondent (Ex. D, E, & F. attached to complaint, R. 20-24). Ample opportunity was given the appellant to be heard by Judge Speer on July 30, 1953 and as stated by Judge Speer in his Order (Ex. F, R. 24) "* * * there was no appearance by the Canadian Indemnity Company, a party in interest served with notice of appeal herein and with the order fixing the day of hearing herein." Appellant clearly had no desire to reform the contract at that time. **Section** 53-419 **Revised Codes of Montana,** 1947 provides in part:

"* * * A copy of such notice must also be served upon all other parties in interest, if there be any, * * *".

To point out that this is not a proper case for reformation of a contract we direct the Court's attention to the case of **Cook-Reynolds Co. v. Beyer,** 79 P. 2d 658, 107 Mont. 1. (Rev. Codes 1935 No. 7497, No. 8745 now 13-325 and 49-108, Rev. Codes 1947). In that case the Court held that if a party acquiesces in a written instrument after becoming aware of a mutual mistake therein, he loses his right to reformation, and the acquiescence may be direct or implied, and may be implied from an unreasonable delay in applying for redress after getting notice of the mistake.

To the same effect is the decision of the Montana Supreme Court in the case of **Krueger v. Morris,** 107 P. 2d 142, 110 Mont. 559, (Rev. Codes 1935 No.

8745-8726, now 49-108 and 17-901, Rev. Codes 1947.) In that case the Court held acquiescence in a contract, after learning that it does not represent the actual agreement, destroys the right of reformation either on ground of mutual mistake or on ground of fraud. Reformation of an instrument under statute on ground of fraud must be sought with reasonable diligence after the discovery of the fraud, and in the case of **Strack v. Federal Land Bank of Spokane,** 218 P. 2d. 1052, 124 Mont. 19 (Rev. Codes of Montana 1947 No. 93-3814), the Montana Supreme Court held in an action to reform certain deeds and a mortgage, on ground of mutual mistake, that the court erred in reforming contract between defaulting defendants and answering defendant, where pleadings by no one demanded that such contract be reformed.

In this case there is no basis for asking that the contract be reformed. That is suggested as appropriate action for the Court to take after the appellant has repeatedly ratified its contract. Yes, ratified when its own witness, W. D. Hirst, an insurance adjuster admitted to practice law in Montana, testified that he had told the appellant **before October 27, 1952** that the accident on September 20, 1952 had occurred prior to the issuance of the contract of insurance on September 20, 1952 (R. 186).

The Notice of Cancellation thereafter issued was a ratification and did affirm the existence of a valid contract for the insured period fixed by the Notice.

The other or **first position** suggested by the appellant's brief for consideration by the Court is that the Court should now permit the appellant to rescind its contract.

Judge Pray in his Opinion and Decision of May 26, 1956 (R. 32-37) covered this point. To quote in part from that Decision:

> "It appears that counsel for the defendant decided to tender a return of the premium June 11, 1954, which was 20 months after the policy had been issued, which was not accepted."
>
> "The defendant could have promptly recinded the contract of insurance upon receipt of the report of its agent following an investigation of the accident which was begun two days after the accident occurred on September 22, 1952. There is no showing of reasonable diligence here either as to recission or cancellation of the contract. Recission must be made promptly upon discovering the facts if the one making the discovery "is free from duress, menace, undue influence, or disability, and is aware of his right to rescind", and furthermore everything received under the contract must be restored, all in accordance with section 13-905 (7565) R.C.M. 1947."

Appellant insurance company admits that it had notice that appellee was sued by Pearl Kissee (Ex. C of complaint, R. 15) on May 22, 1954. The evidence had shown that appellee, through his attorneys, notified the appellant, Canadian Indemnity Company, at the time the suit was filed and asked that the company defend Mr. Tacke under the terms of its policy. The company still declined to take any action, but did, only three days before a pleading was due in the

District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade in the Pearl Kissee case, try to tender a return of the premium (Ex. 1, R. 195), which tender was refused (Ex. 3, R. 197). This tender was made on June 11, 1954 by Attorney Hoffman with his own personal check and not with the check of appellant, Canadian indemnity Company (Ex. 3, R. 196). Mr. Hoffman testified that "I made the decision that that check should be issued" (R. 64). This previous lack of action is certainly more than an unreasonable delay—the first action by the company in deciding it should return the premium was on June 11, 1954 (for the policy effective September 20, 1952)—or one year and eight months later (R. 60; Ex. 1, R. 195).

There was no rescission of this contract but a cancellation as of December 21, 1952 within the terms of the contract. The statute of Montana governing rescission provides:

> **"Revised Codes of Montana, 1947,** 13-905 (7567) Rescission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> "1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
>
> "2. He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do like-

wise, unless the latter is unable or positively refuses to do so."

Under the law of rescission the party, (appellant) must act **promptly** and must return **everything of value** he received. That is the statutory law of Montana as indicated above.

If the appellant thought the contract was issued on a fraudulent basis it did have an opportunity to rescind it in 1952. As stated by the Court in **Burnes vs. Burnes,** 137 Fed. 781, 800:

> "The law gives one who is induced by fraud to make a contract the option to rescind it. But it imposes upon him the duty to exercise that option with all convenient speed after his discovery of the fraud. He may not speculate upon it. He may not lie in wait until time and change make his interest plain, and then make his choice. Silence, delay, acquiescence, or the retention of the fruits of the agreement for any considerable length of time after the discovery of the fraud, constitutes a complete and irrevocable ratification of the transaction." Cases cited.

The action of the appellant in this case was clearly a ratification of the contract.

a. The accident was reported to the agent authorized to issue the policy before noon on September 20, 1952. The policy was thereafter mailed to Leo Tacke, the appellee. The postmark on the envelope (Ex. 7, R. 199) shows that the stamp was cancelled at 5:00 P.M. on September 20, 1952.

b. On September 22, 1952, a receipt for the insurance premium paid by the appellee was given (Appellee's Ex. 8, R. 200).

c. The insurance adjuster prior to October 27, 1952 advised the appellant that his investigation disclosed that the accident had occurred prior to the issuance of the insurance contract (R. 186).

d. On December 10, 1952, the appellant cancelled the insurance contract effective December 21, 1952 as of 12:01 A.M. That Notice of Cancellation (Ex. B attached to complaint, R. 15, and introduced in evidence as Ex. 9) was issued by the General Agent for the appellant in this case and it was issued "under the terms of automobile policy No. 22 CA 3908". That document in and of itself was a ratification and remains to this date a ratification of the insurance contract. The provisions of Paragraph numbered 22 of the contract of insurance (Ex. A attached to complaint, R. 12 and introduced in evidence as Ex. 6) were relied on by the appellant insurance company. Appellant retained the right in that provision of the policy to cancel it and it used that right to pro-rate the earned premium and returned the unearned portion of the premium that had been paid by the appellee. For what period of time did they compute the earned premium? The answer is obvious. From 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952. This was done by the appellant company after its investigator, Mr. Hirst, had advised the company that his investigation disclosed that the accident had occurred prior to the issuance of the policy on September 20, 1952 (R. 186). That cancellation and

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ARGUMENT

At the outset of appellant's argument in its brief inconsistent positions are adopted. First, a case is cited to contend that the insurance policy is void and then, as a comment on that case, counsel states:

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Schultz, Supervisor of Montana Highway Patrol, respondent (Ex. D, E, & F. attached to complaint, R. 20-24). Ample opportunity was given the appellant to be heard by Judge Speer on July 30, 1953 and as stated by Judge Speer in his Order (Ex. F, R. 24) "* * * there was no appearance by the Canadian Indemnity Company, a party in interest served with notice of appeal herein and with the order fixing the day of hearing herein." Appellant clearly had no desire to reform the contract at that time. **Section 53-419 Revised Codes of Montana,** 1947 provides in part:

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To point out that this is not a proper case for reformation of a contract we direct the Court's attention to the case of **Cook-Reynolds Co. v. Beyer,** 79 P. 2d 658, 107 Mont. 1. (Rev. Codes 1935 No. 7497, No. 8745 now 13-325 and 49-108, Rev. Codes 1947). In that case the Court held that if a party acquiesces in a written instrument after becoming aware of a mutual mistake therein, he loses his right to reformation, and the acquiescence may be direct or implied, and may be implied from an unreasonable delay in applying for redress after getting notice of the mistake.

To the same effect is the decision of the Montana Supreme Court in the case of **Krueger v. Morris,** 107 P. 2d 142, 110 Mont. 559, (Rev. Codes 1935 No.

8745-8726, now 49-108 and 17-901, Rev. Codes 1947.) In that case the Court held acquiescence in a contract, after learning that it does not represent the actual agreement, destroys the right of reformation either on ground of mutual mistake or on ground of fraud. Reformation of an instrument under statute on ground of fraud must be sought with reasonable diligence after the discovery of the fraud, and in the case of **Strack v. Federal Land Bank of Spokane,** 218 P. 2d. 1052, 124 Mont. 19 (Rev. Codes of Montana 1947 No. 93-3814), the Montana Supreme Court held in an action to reform certain deeds and a mortgage, on ground of mutual mistake, that the court erred in reforming contract between defaulting defendants and answering defendant, where pleadings by no one demanded that such contract be reformed.

In this case there is no basis for asking that the contract be reformed. That is suggested as appropriate action for the Court to take after the appellant has repeatedly ratified its contract. Yes, ratified when its own witness, W. D. Hirst, an insurance adjuster admitted to practice law in Montana, testified that he had told the appellant **before October 27, 1952** that the accident on September 20, 1952 had occurred prior to the issuance of the contract of insurance on September 20, 1952 (R. 186).

The Notice of Cancellation thereafter issued was a ratification and did affirm the existence of a valid contract for the insured period fixed by the Notice.

The other or **first position** suggested by the appellant's brief for consideration by the Court is that the Court should now permit the appellant to rescind its contract.

Judge Pray in his Opinion and Decision of May 26, 1956 (R. 32-37) covered this point. To quote in part from that Decision:

> "It appears that counsel for the defendant decided to tender a return of the premium June 11, 1954, which was 20 months after the policy had been issued, which was not accepted."
>
> "The defendant could have promptly recinded the contract of insurance upon receipt of the report of its agent following an investigation of the accident which was begun two days after the accident occurred on September 22, 1952. There is no showing of reasonable diligence here either as to recission or cancellation of the contract. Recission must be made promptly upon discovering the facts if the one making the discovery "is free from duress, menace, undue influence, or disability, and is aware of his right to rescind", and furthermore everything received under the contract must be restored, all in accordance with section 13-905 (7565) R.C.M. 1947."

Appellant insurance company admits that it had notice that appellee was sued by Pearl Kissee (Ex. C of complaint, R. 15) on May 22, 1954. The evidence had shown that appellee, through his attorneys, notified the appellant, Canadian Indemnity Company, at the time the suit was filed and asked that the company defend Mr. Tacke under the terms of its policy. The company still declined to take any action, but did, only three days before a pleading was due in the

District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade in the Pearl Kissee case, try to tender a return of the premium (Ex. 1, R. 195), which tender was refused (Ex. 3, R. 197). This tender was made on June 11, 1954 by Attorney Hoffman with his own personal check and not with the check of appellant, Canadian indemnity Company (Ex. 3, R. 196). Mr. Hoffman testified that "I made the decision that that check should be issued" (R. 64). This previous lack of action is certainly more than an unreasonable delay—the first action by the company in deciding it should return the premium was on June 11, 1954 (for the policy effective September 20, 1952)—or one year and eight months later (R. 60; Ex. 1, R. 195).

There was no rescission of this contract but a cancellation as of December 21, 1952 within the terms of the contract. The statute of Montana governing rescission provides:

> **"Revised Codes of Montana, 1947,** 13-905 (7567) Rescission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> "1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
>
> "2. He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do like-

wise, unless the latter is unable or positively refuses to do so."

Under the law of rescission the party, (appellant) must act **promptly** and must return **everything of value** he received. That is the statutory law of Montana as indicated above.

If the appellant thought the contract was issued on a fraudulent basis it did have an opportunity to rescind it in 1952. As stated by the Court in **Burnes vs. Burnes,** 137 Fed. 781, 800:

> "The law gives one who is induced by fraud to make a contract the option to rescind it. But it imposes upon him the duty to exercise that option with all convenient speed after his discovery of the fraud. He may not speculate upon it. He may not lie in wait until time and change make his interest plain, and then make his choice. Silence, delay, acquiescence, or the retention of the fruits of the agreement for any considerable length of time after the discovery of the fraud, constitutes a complete and irrevocable ratification of the transaction." Cases cited.

The action of the appellant in this case was clearly a ratification of the contract.

a. The accident was reported to the agent authorized to issue the policy before noon on September 20, 1952. The policy was thereafter mailed to Leo Tacke, the appellee. The postmark on the envelope (Ex. 7, R. 199) shows that the stamp was cancelled at 5:00 P.M. on September 20, 1952.

b. On September 22, 1952, a receipt for the insurance premium paid by the appellee was given (Appellee's Ex. 8, R. 200).

c. The insurance adjuster prior to October 27, 1952 advised the appellant that his investigation disclosed that the accident had occurred prior to the issuance of the insurance contract (R. 186).

d. On December 10, 1952, the appellant cancelled the insurance contract effective December 21, 1952 as of 12:01 A.M. That Notice of Cancellation (Ex. B attached to complaint, R. 15, and introduced in evidence as Ex. 9) was issued by the General Agent for the appellant in this case and it was issued "under the terms of automobile policy No. 22 CA 3908". That document in and of itself was a ratification and remains to this date a ratification of the insurance contract. The provisions of Paragraph numbered 22 of the contract of insurance (Ex. A attached to complaint, R. 12 and introduced in evidence as Ex. 6) were relied on by the appellant insurance company. Appellant retained the right in that provision of the policy to cancel it and it used that right to pro-rate the earned premium and returned the unearned portion of the premium that had been paid by the appellee. For what period of time did they compute the earned premium? The answer is obvious. From 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952. This was done by the appellant company after its investigator, Mr. Hirst, had advised the company that his investigation disclosed that the accident had occurred prior to the issuance of the policy on September 20, 1952 (R. 186). That cancellation and

the retention of the earned premium can be construed only as a ratification of the contract of insurance.

We submit that this Court cannot in fairness and justice accept either of the suggestions made by the appellant's brief, that is, to re-write the contract and make it say something different than it does say, or relieve the appellant from the obligations of its contract on the law of rescission after repeated acts of ratification on the part of the appellant. There is no question of fraud in this case:

> "THE COURT: Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way there is none here at all." (R. 193).

There is no question about the authority of the agent Bill Kelly Realty to issue a contract of insurance (Paragraph II of Complaint, R. 3 and Paragraph a of Answer, R. 28, and Findings of Fact and Conclusions of Law R. 38).

Those decisions cited by appellant in its brief dealing with the submitting of written applications subject to acceptance by an insurance company do not apply in this case. The cases cited by appellant do not apply to this factual situation. Furthermore most of those cases involve fire and other type policies with problems of insurable interest, good health, and other dissimilar situations having no bearing on this case. It is apparent that appellant is trying to lead the Court to believe that this is a case different than it really is. Appellant would lead this Court to believe that a personal memorandum made as the re-

sult of a telephone call was a written application (R. 167). However, even adopting appellant's view of the facts the doctrine of waiver and estoppel applies and the appellant cannot now avoid its contractual liability. This matter was considered by Judge Pray in his Opinion and Decision (R. 32-37 and R. 37).

> "Although this case presents a rather unusual situation in respect to the facts it does seem clearly to appear from a consideration of all the evidence that the defendant by its own acts is estopped from denying the validity of its contract of insurance, and the preponderance of the evidence appears to favor the plaintiff, and such is the decision of the court herein.***"

This case is quite similar to **Firemans' Insurance Co. of Newark, N.J. vs. Show,** et al., 110 F. Supp. 523, in that both cases involve insurance policies wherein the question of estoppel and waiver may be involved. The Court held in a declaratory judgment action by an automobile liability insurer for determination of rights under a policy which had been issued on condition that the vehicle covered was solely owned by the named insured, but transferred to the vehicle of which the insured was allegedly not sole owner, that the insurers were estopped from contending that the policy was void or that they relied on false and untrue statements and declarations made by the insured and another, by action of their agent who transferred the policy knowing that the insured had paid consideration for a vehicle but that the record of title and of purchase money mortgage would appear in the name of another.

Now in our case appellant still retains the premium for the policy issued to appellee and effective from September 20, 1952 at 12:01 A.M. until time of cancellation in conformity with the terms of the policy on December 21, 1952 at 12:01 A.M. By accepting the benefits of this contract and retaining these benefits in the form of a premium the appellant Canadian Indemnity Company has consented to all the obligations of the contract. See **Revised Codes of Montana,** 1947, as follows:

> "13-325 (7497) **Assumption of obligation by acceptance of benefits.** A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Applying this section in **Beebe vs. James,** 8 P (2d) 803, 91 Mont. 403, our Montana Supreme Court held where a party having entered into a contract discovered he had been defrauded but still retained the land and used it as his own had waived the fraud and ratified the contract. In the Beebe case there was even a notice given that the contract would be rescinded because of the discovery of fraud, but the benefits were retained. In our present case there is no evidence of fraud, but rather a transaction made in good faith and a contract of insurance issued with an acceptance of the benefits by the appellant insurance company.

Our Montana Supreme Court has in **Cook-Reynolds Co. vs. Beyer,** 79 P. (2d) 658, 107 Mont. 1, held

that acquiescence may be implied from an unreasonable delay in applying for redress after getting notice of the mistake.

And in a recent case we find the rule stated as follows:

> "Forfeiture of an insurance policy is waived as a matter of law if, in negotiations or transactions with the insured after knowledge of facts permitting the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon."
>
> Seavey v. Erickson, 244 Minn. 232, 69 N.W. (2d) 889, 52 A.L.R. (2d) 1144.

In another Montana decision the court held:

> "***It has generally been held that, where the agent of the insurance company, at the time of issuing the policy, knows facts which by the terms of the policy render it void, **the insurance company by issuing the policy** and accepting the premium waives such provision in the policy, or, as some courts hold, **is estopped from asserting nonliability under such** circumstances." Cases cited.
>
> (Boldface ours)
>
> Krpan vs. Central Federal Ins. Co. 87 Mont. 345; 287 P. 217 at 218.

And as stated by the Court in the case of **C. E. Carnes & Co. v. Employers' Liability Assur. Corp.** 101 Fed. (2d) 739 at 742:

> "***The substance of the doctrine of waiver as applied in the law of insurance is that if the insurer with knowledge of facts which would bar an existing primary liability, recognizes such primary liability by treating the policy as in force, he will not thereafter be allowed to plead such facts to avoid his primary liability."

Answering further some of appellant's contentions, there is nothing illegal or wrong in entering into an insurance contract for protection against a loss which may already have occurred, nor is there anything illegal or wrong in issuing a policy and predating said policy.

> "No legal obstacle exists to prevent parties, if they so desire, from entering into contracts of insurance to protect against loss that may possibly have already occurred."
>
> United States of America vs. Patryas, 303 U.S. 341, 82 L. Ed. 883.

Also see **Hooper vs. Robinson,** 98 U. S. 528, 25 L. Ed. 219 (P. 220 2nd column L. Ed.)

> "One may become a party to an insurance (contract) effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made."

Also:

> "If there is a binding contract of insurance, the fact that the policy is not delivered until after a loss occurred does not defeat insured's right to recover under the contract."
>
> El Dia Ins. Co. vs. Sinclair, 228 Fed. 833.

And further in **Blashfield's Cyclopedia of Automobile Law and Practice,** Vol. 6, Page 722, Sec. 3996), we find the following statement:

> "****An insurer may by contracting to do so assume liability for losses occurring before the date of the policy or before its execution and delivery."

The law generally is as follows:

"The time at which the risk under a policy of insurance commences and the period during which it continues and at the expiration of which it terminates are to be determined by reference to the terms of the contract."

44 C. J. S. page 1261.

"The time at which the risk commences under a policy of accident insurance is to be determined by reference to the terms of the contract.***"

44 C. J. S. page 1267.

The appellant is now estopped as a matter of law from claiming there was no effective contract of insurance. If there originally was any legal basis to rescind the contract there has been a **waiver** by issuing a policy and by acceptance of and retention of a premium for a fixed term and the appellant is now estopped from denying coverage under the valid contract.

Judge Pray said further in his Opinion and Decision (R. 32-37)

"It would seem that the defendant by accepting the entire premium on the policy for the full year and retaining it for the period of three months would be bound by the obligations assumed in the contract of insurance. While there was no fraud alleged here it has been held that where fraud was discovered by a party to a contract and he accepted the consideration therefor and applied the same to his own use, the fraud was waived. Any unreasonable delay in moving for redress where fraud or mistake is discovered by a party to a contract may be held to be consent or acceptance notwithstanding the fraud or mistake."

It must be remembered that the appellant fixed the three month period that the insurance policy was in force, to-wit: from 12:01 A.M. September 20, 1952 to 12:01 December 21, 1952. That is the finding of the trial court in its opinion and expressly set forth in Finding of Fact No. 5 (R. 39) and in the Judgment (R.41).

We respectfully submit that this Court should affirm the Opinion and Decision of the Honorable Charles N. Pray and the Findings of Fact, Conclusions of Law and Judgment entered in accordance therewith.

Respectfully submitted,

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Service of the foregoing Appellee's Brief and receipt of three copies thereof is hereby admitted this ..... day of March, 1958.

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